Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC,
Petitioners,

v.

ABC, INC. and HERBERT FISHGOLD,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

This case raises the following interrelated issues:

Does a federal court violate the rule of *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) when it confirms the award of a labor arbitrator who decided his own jurisdiction and proceeded with the merits of an arbitration over the repeated objections of a party to a collective bargaining agreement?

May a party's right to an initial judicial determination of substantive arbitrability as required by *AT&T Technologies* be conditioned by the Second Circuit upon that party's filing of a lawsuit to stay the labor arbitration?

Do the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. §§ 101, *et seq.*, prohibit the Second Circuit from requiring a party that seeks an initial judicial determination of substantive arbitrability to first enjoin the labor arbitration in federal district court?

PARTIES TO THE PROCEEDING

The parties in this case are those named in the caption: National Association of Broadcast Employees & Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL-CIO, CLC; ABC, Inc.; and Herbert Fishgold.

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NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC,

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PETITION FOR WRIT OF CERTIORARI

The National Association of Broadcast Employees & Technicians, the Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL-CIO, CLC ("NABET-CWA" or the "Union") petition for a writ of *certiorari* to review the decision and judgment of the United States Court of Appeals for the Second Circuit in *NABET-CWA v. ABC, Inc., et al.*, Docket Nos. 97-7010, 97-7409 (April 15, 1998).

OPINIONS BELOW

The decision of the court of appeals is reported at 140 F.3d 459 and is reproduced in the appendix to this petition ("Pet. App.") at pp. 1a-8a, *infra*.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 15, 1998. The court of appeals denied a timely petition for rehearing on June 12, 1998. Pet. App. at pp. 9a-10a, *infra*. An application for an extension of time within which to file a petition for a writ of *certiorari* was granted on August 17, 1998. Pet. App. at p. 11a, *infra*.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Norris-LaGuardia Act, 29 U.S.C. § 101, provides:

> No court of the United States, as herein defined, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

Sections 4, 7, 8, 9 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 107, 108, 109 and 113 are set out in Appendix D. Pet. App. at pp. 12a-17a, *infra*.

Section 301(a) of the Labor Management Relations Act, as amended, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may

> be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The collective bargaining agreement between ABC, Inc. ("ABC" or the "Employer") and NABET-CWA, which applies only to sporting events within the continental United States, contains the following no strike clause:

> It is agreed that there will be no stoppage of work, lockout or other interference with Company operations and that the employees hereunder will perform their regular and customary duties for the Company until one of the parties has failed to comply promptly with any final decision of the Impartial Umpire or an arbitrator pursuant to Article XX.

The agreement also contains the following pertinent arbitration clause:

> if a party to the Agreement claims that there will be a violation of Article V [no strike clause] . . . such party shall have the right to file a grievance directly with the Impartial Umpire setting forth such claim, demanding injunctive relief, and invoking the expedited arbitration procedure set forth below.

Between October 25, 1996 and February 16, 1997, NABET-CWA and certain per diem employees engaged in a series of organizing activities directed at organizing all per diem employees of ABC Sports regularly hired to work in Hawaii at live broadcasts such as the Aloha Bowl, the Battle of the Gridiron, the Pro Bowl, and the Hawaiian Open. These employees and these events were indisputably not covered by the parties' collective bargaining agreement. Until this dispute arose, the collective bargaining agreement in its entirety (including the right to grieve or arbitrate on behalf of employees working on these events) simply did not apply.

In an effort to restrain the Union's lawful activities outside the scope of contractual coverage, the Employer invoked an arbitration clause, arranged arbitration dates with the arbitrator, and claimed that the Union was violating the no strike clause.

The Union pointed out that the dispute was not covered by the collective bargaining agreement and that it was not substantively arbitrable. The Union also advised the arbitrator both orally and in writing that the agreement did not cover the dispute, that the parties never agreed to arbitrate non-contractual matters concerning overseas per diem employees, that the arbitrator did not have jurisdiction over the dispute or the authority to decide his own jurisdiction, that the resolution of the parties' disagreement over substantive arbitrability must be decided by a court of law and not by the arbitrator, and that without a court order compelling arbitration, the Union would not participate in an *ultra vires* arbitration.

On December 17, 1996, the arbitrator determined that he had the jurisdiction to decide questions of substantive arbitrability, that the matter was arbitrable, and that he would proceed to hear the merits of ABC's grievance without the Union's participation even though the Union had, by service of a verified complaint upon the Employer and the arbitrator, invoked the jurisdiction of the federal district court seeking to vacate the arbitrator's initial determination of his own jurisdiction over this dispute. Disregarding the Union's protest, the arbitrator conducted a hearing without the Union's participation and determined that NABET-CWA violated the no strike clause and enjoined the Union from engaging in picketing and other activities in Hawaii—activities that would normally be protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157. The arbitrator also retained jurisdiction for the purpose of awarding compensatory and punitive damages against the Union.

Before the federal district court, the Union sought to vacate the awards on the grounds that the arbitrator violated the rule of *AT&T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643 (1986) when he decided the issue of substantive arbitrability over the Union's objection and when he decided the merits of the dispute without the contractual authority to do so. The district court (i) upheld the authority of the arbitrator to determine substantive arbitrability, (ii) held that the Union waived its right to a judicial determination of the arbitrator's authority to decide substantive arbitrability because it failed to seek a judicial stay of arbitration, (iii) decided *nunc pro tunc* that the dispute was arbitrable and that the arbitrator had the authority to proceed on the merits, and then (iv) confirmed the awards.

Upon appeal, the Second Circuit could not say with "positive assurance" that the dispute was not arbitrable and rejected the Union's contentions regarding the proper application of the rule of *AT&T Technologies.* Virtually turning the United States Supreme Court's rule of *AT&T Technologies* upside down, the circuit asserted there was no reason why substantive arbitrability, when raised by a party to a labor contract, must be decided by a court in the first instance before an arbitration is held or an award issued. According to the circuit, if the party contesting substantive arbitrability wants a court determination of arbitrability prior to the arbitration taking place, that party has the burden of asking a court to enjoin the arbitration on the ground that the underlying dispute is not arbitrable. In the instant case, the Second Circuit held that an arbitrator can determine his own jurisdiction and proceed with an arbitration over the objections of one of the parties if the party contesting substantive arbitrability fails to seek an immediate stay of the arbitration in district court.

REASONS FOR GRANTING THE WRIT

The Second Circuit decided this case in conflict with applicable decisions of the United States Supreme Court and decisions of other U.S. Courts of Appeals on the same question. Moreover, the circuit's decision raises an important question of federal law which has not been, but should be, settled by the United States Supreme Court.

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-558 (1964) and then again in *AT&T Technologies*, the Supreme Court affirmed and reaffirmed that (i) arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit, (ii) issues of substantive arbitrability—whether a labor agreement creates a duty for the parties to arbitrate a particular grievance—is undeniably an issue for judicial determination, and (iii) unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator.

> Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered by the parties. . . . The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty.

AT&T Technologies, 475 U.S. at 649, *citing*, *John Wiley & Sons*, 376 U.S. at 546-547. Reaffirming that arbitrators are not empowered to determine their own jurisdiction, the Supreme Court explained that

> [t]he willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the power to determine his own juris-

> diction . . . Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." . . . This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective bargaining agreements, and is antithetical to the function of a collective bargaining agreement as setting out the rights and duties of the parties.

AT&T Technologies, 475 U.S. at 651.

The Second Circuit, dismissing the rule of *AT&T Technologies*, held that an arbitrator may decide his own jurisdiction over the repeated objections of a party to the collective bargaining agreement if the party contesting substantive arbitrability does not seek to enjoin the arbitration. According to the Second Circuit,

> While the quoted language lends marginal support to NABET's position, we do not believe that it mandates the rule asserted by NABET. We see no reason why arbitrability must be decided by a court before an arbitration award can be made. If the party opposing arbitration desires that order of proceedings, it can ask a court to enjoin arbitration on the ground that the underlying dispute is not arbitrable. If it does not seek to enjoin the arbitration, it can raise the arbitrability issue in a judicial confirmation proceeding. . . . If arbitrability is rejected after the award, the party opposing arbitration will have obtained the relief sought. If arbitrability is upheld after the award, there is no reason for a court not to confirm the arbitrator's award. . . . In such a case, the party opposing arbitration will have obtained the judicial ruling, although adverse, on arbitrability.

NABET v. ABC, 140 F.3d at 462. According to the Second Circuit, "there is thus nothing to be gained by

adopting NABET's proposed rule"—that is, the Supreme Court's rule of *AT&T Technologies*.

Unfortunately, the Second Circuit has premised its interpretation of *AT&T Technologies* upon a legal option that violates the anti-injunction provisions of the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, and which conflicts with the decisions of other U.S. Courts of Appeals on the same matter.

Unlike the Second Circuit, most circuit courts hold that the Norris-LaGuardia Act bars federal district courts from enjoining labor arbitrations. The Third Circuit, the Ninth Circuit and the D.C. Circuit share the view that an injunction to stay a labor arbitration is barred by Norris-LaGuardia because the underlying grievance constitutes a labor dispute as defined by the Act. The Second Circuit, on the other hand, now requires that a party contesting substantive arbitrability prior to the arbitration taking place ask a court to enjoin the arbitration as a condition precedent to a court determination of substantive arbitrability. In effect, the opinion of the Second Circuit permits an arbitrator to determine his own jurisdiction unless the party contesting substantive arbitrability first seeks to enjoin the arbitration in violation of the anti-injunction provisions of the Norris-LaGuardia Act.

The split and confustion in the circuits over the application of the anti-injunction provisions of the Norris-LaGuardia Act to labor arbitrations has permitted the Second Circuit to turn the rule enunciated by the Supreme Court in *John Wiley & Sons* and *AT&T Technologies* on its head.

That the circuits are split over the application of the Norris-LaGuardia Act to labor arbitrations is clear. While the Second Circuit now requires that a party contesting arbitrability seek to stay the arbitration in order to have an initial judicial determination of arbitrability, other de-

cisions in that circuit, as well as other circuits, suggest that this precondition is unlawful.

For example, the Second Circuit is confused about whether the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, bars a district court from staying a labor arbitration. Both *Longshoremen's Local 1814 v. NYSA*, 965 F.2d 1224 (2d Cir. 1992) and *Jou-Jou Designs, Inc. v. ILGWU*, 643 F.2d 905 (2d Cir. 1981), in contradiction to the opinion in the instant case, hold that Norris-LaGuardia does not permit a district court to enjoin a labor arbitration other than in narrow exceptions such as where a stay is sought to further RICO's remedial purposes. By comparison, *Emery Air Freight Corp. v. Local Union 295*, 786 F.2d 93 (2d Cir. 1986) permits but discourages injunctions in labor arbitrations without mentioning Norris-LaGuardia. That an unresolved split or lack of uniformity presently exists within the circuit is evidenced by a series of cases which freely enjoin labor arbitrations by either ignoring Norris-LaGuardia, *Diamond Glass Corp. v. Local 206*, 682 F.2d 301 (2d Cir. 1982), or by claiming that arbitrations are not labor disputes contemplated by Norris-LaGuardia. *ABC v. AFTRA*, 412 F. Supp. 1077 (S.D.N.Y. 1976); *Umeko, Inc. v. NY Coat Workers*, 484 F. Supp. 210 (S.D.N.Y. 1980); *General Contractors Assn. v. Local 46*, 1990 U.S. Dist. LEXIS 3155 (S.D.N.Y. 1990).

While the Second Circuit has virtually reprimanded Petitioner for failing to seek an injunction in the instant matter, the Third Circuit, interpreting Second Circuit law, has concluded that the federal district courts in the Second Circuit are now barred by Norris-LaGuardia from enjoining labor arbitrations. *Lukens Steel Company v. United Steelworkers of America (AFL-CIO)*, 989 F.2d 668, 677 (3d Cir. 1993). Without doubt, the Third Circuit, the D.C. Circuit, and the Ninth Circuit share the view that an injunction to stay the arbitration of a grievance is a labor dispute governed, and therefore barred, by Norris-

LaGuardia. *Lukens Steel Company*, 989 F.2d at 668; *In re MEBA, Pacific Coast District*, 723 F.2d 70 (D.C. Cir. 1983); *Camping Constr. Co. v. District Council of Iron Workers*, 915 F.2d 1333 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 1684 (1991).[1]

The First Circuit, on the other hand, has recognized that the law is unsettled and has invited the United States Supreme Court to resolve the conflicts. In *Tejidos De Coamo v. ILGWU*, 22 F.3d 8 (1st Cir. 1994), the court vacated a district court's stay of arbitration on the grounds that it violated Section 7 of the Norris-LaGuardia Act. In so doing, the First Circuit noted the following:

> What law can be found in the circuits may lean slightly in favor of the view that section 7 does apply here: the Ninth Circuit has so held, as did the Third (though by a two-to-one vote); and the Second Circuit cases that look in the opposite direction do not directly discuss our issue.
>
> On balance, we are disposed to hold that section 7 does govern a suit to enjoin a labor arbitration—unless and until the Supreme Court says otherwise. Carving out new exceptions to the Norris-LaGuardia Act, or markedly extending old ones, is primarily a matter for the Supreme Court. We think such a step is entirely possible; but we do not think it so certain that we should anticipate it.

Tejidos De Coamo, 22 F.2d at 13. There is no question that the First Circuit would find the Second Circuit's decision in the instant case violative of Norris-LaGuardia.

The Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits have not decided this issue although a district court in the Sixth Circuit has reviewed and sum-

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[1] *In Francesco's B. v. Hotel Employees, Local 28*, 659 F.2d 1383 (9th Cir. 1981), the circuit court was not permitted to review an issue similar to the one raised in this case because the initial order of the district court directing the arbitrator to determine his own jurisdiction was not challenged by a timely appeal.

marized the conflicts in the circuits and has concluded that the anti-injunction provisions of Norris-LaGuardia prohibit a district court from enjoining labor arbitrations. *Meijer Inc. v. Food Workers Local 951*, 148 L.R.R.M. (BNA) 2437 (W.D. Mich. 1994), 1994 U.S. Dist. LEXIS 19933.

Notwithstanding that most circuits bar district courts from enjoining labor arbitrations under the Norris-LaGuardia Act, district courts continue to be willing to issue such injunctions. *See, e.g., Post Tribune Publishing v. American Arbitration Association*, 767 F.Supp. 935 (N.D. Ind. 1991); *Standard Drywall, Inc. v. Orange Belt District Council of Painters No. 48*, 111 L.R.R.M. (BNA) 2723 (S.D. Ga. 1982), 1982 U.S. Dist. LEXIS 15853. It is this confusion that has permitted the Second Circuit to fashion a rule of law which conflicts with the rule of *AT&T Technologies.*

This is not the first time that federal courts have failed to heed the United States Supreme Court's warning about permitting an arbitrator to determine his own jurisdiction. The Court did it in *John Wiley & Sons* and then again in *AT&T Technologies.* Petitioner is asking the Court to again protect the integrity of the voluntary labor arbitration process.[2]

It is important for the Court to understand what happened in this case. In most labor arbitrations, parties jointly select an arbitrator after a union's grievance is not resolved at the final step of the grievance procedure. At that juncture, however, an employer rarely agrees to select an arbitrator if it believes the collective bargaining agreement does not cover the dispute in question. In those cases where an employer contests substantive arbitrability, the union is required to compel arbitration in federal district court pursuant to Section 301 of the Labor

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[2] A summary disposition on the merits would also be appropriate in this case.

Management Relations Act, 29 U.S.C. § 185. The district court then applies the "presumptively arbitrable" standard that the Court developed in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), leaving the merits of the case to be decided by the arbitrator.

In the vast majority of cases where the employer contests substantive arbitrability, the union is forced to compel arbitration by filing a federal lawsuit.[3] Rarely is a employer forced to submit to an arbitration before the court has made an initial judicial determination as to arbitrability. It is equally uncommon for an employer to seek a stay of arbitration; the employer effectively stays an arbitration by simply refusing to consent to the selection of an arbitrator. Seldom does an arbitrator walk into a hearing room without both parties having agreed to arbitrate, or without one of the parties having a court order in hand compelling arbitration.

In the instant case, the employer initiated the grievance and the parties had a designated contract arbitrator who did not have to be mutually selected to hear the case. Thus, Petitioner did not have the opportunity to "stay" the arbitration by refusing to select an arbitrator—he was already selected and prepared to proceed in violation of the rule of *AT&T Technologies*. Therefore, ABC had no reason to compel arbitration and Petitioner could not force ABC to get an initial judicial determination of arbitrability as the byproduct of filing a motion to compel. Nor could Petitioner, without violating the Norris-LaGuardia Act, have enjoined the arbitration.

Because the arbitrator unlawfully decided his own jurisdiction and proceeded on the merits without Petitioner's presence, Petitioner never had the opportunity to present

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[3] The Supreme Court has made it clear that questions of procedural, as opposed to substantive, arbitrability are to be decided by the arbitrator. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 555-558 (1964).

its case on the merits—that a no-strike pledge did not and could not exceed the scope of a collective bargaining agreement and its arbitration clause. While there is no doubt that Petitioner could have participated in the arbitration and preserved its arbitrability objection for a motion to vacate the award, Petitioner would have been compelled to arbitrate a dispute it believed it had not agreed to arbitrate without any prior opportunity for court review. The Second Circuit's decision makes Petitioner's participation on these terms the only option available to a party in this circuit contesting substantive arbitrability. This result does not conform with the law of *AT&T Technologies.*

Petitioner contends that an arbitrator cannot proceed with a hearing without either the consent of the parties or a court order issued pursuant to a motion to compel from the party seeking to go forward with the arbitration.[4] Contrary to the Second Circuit's opinion, this long-held view of *AT&T Technologies* does not create the possibility of two bites at the apple. Rather, a party challenging substantive arbitrability could either choose to participate in the arbitration preserving its arbitrability objection for a motion to vacate, or it could refuse to arbitrate and make its arbitrability objection upon its adversary's motion to compel. If the motion to vacate is denied after the arbitration is held, the arbitration award is confirmed on the merits. If the motion to vacate is granted, the award is null and void. Similarly, if the motion to compel is defeated, the arbitrator cannot proceed for lack of jurisdiction. If the motion to compel is

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[4] The only other time an arbitrator can proceed is when the collective bargaining agreement expressly authorizes the arbitrator to decide substantive arbitrability for the parties. There is no dispute in this case that the collective bargaining agreement between ABC and NABET-CWA does not give the arbitrator that authority. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995); *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986).

granted, an arbitration on the merits takes place for the first time. There is never an opportunity for a second bite at the apple. The Second Circuit just got it wrong.

CONCLUSION

This case presents a question of exceptional and recurring importance—whether the Norris-LaGuardia Act prohibits district courts from enjoining labor arbitrations and therefore, prohibits the Second and other circuits from conditioning a party's right to have an initial judicial determination of substantive arbitrability upon a lawsuit to enjoin the arbitration. In this case, the Second Circuit upheld the authority of an arbitrator in a labor dispute to determine substantive arbitrability and his own jurisdiction in violation of *AT&T Technologies*.

Accordingly, Petitioner requests that this Court issue a writ of *certiorari* to review the decision of the Second Circuit in this case.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: November 10, 1997 Decided: April 15,1998)

Docket Nos. 97-7010, 97-7409

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC,
Plaintiff-Appellant,

—v.—

AMERICAN BRADCASTING COMPANY, INC. (ABC); HERBERT FISHGOLD,
Defendants-Appellees.

Before:

WINTER, *Chief Judge*,
VAN GRAAFEILAND, and MCLAUGHLIN, *Circuit Judges.*

WINTER, *Chief Judge*:

The National Association of Broadcast Employees & Technicians ("NABET") appeals from Judge Sprizzo's confirmation of three arbitration awards. In the course of reviewing the merits of these awards, the district court

held that NABET's dispute with appellees (collectively, "ABC") was arbitrable under the pertinent collective agreement. NABET argues that the district court incorrectly concluded the arbitrator had power to hear the underlying dispute and that, even if the dispute is arbitrable, NABET is entitled to a second arbitration hearing because no court determined prior to the first arbitration that the dispute was arbitrable. We affirm.

BACKGROUND

For decades, NABET and ABC have been parties to successive collective bargaining agreements governing ABC's employment of NABET members. However, these agreements, including the one pertinent to this appeal, cover the terms and conditions of employment of NABET members only in the continental United States. ABC's employment of NABET members in Hawaii has given rise to the present dispute.

In October 1996, ABC began hiring "freelancers," most of whom were NABET members, for its Christmas Day broadcast of the Aloha Bowl in Hawaii. The hiring of freelancers caused NABET to demand recognition from ABC as the freelancers' collective bargaining representative. ABC refused. NABET then sent a letter to its members, stating that it intended to represent the freelancers and would engage in "lawful activities designed to achieve fair working conditions" for them.

ABC feared that NABET would disrupt ABC's broadcast of the Aloha Bowl. Accordingly, it filed a grievance with the Impartial Umpire provided for in the collective bargaining agreement, claiming that any disruptive activities would violate the agreement. Although all agree that the collective bargaining agreement does not govern ABC's employment of NABET members in Hawaii, ABC maintained that any disruptive activities by NABET were prohibited by Section 5.1 of the agreement even if they

occurred in Hawaii. That Section provides in pertinent part:

> It is agreed that there will be no stoppage of work, lockout, or other interference with Company operations and that the employees hereunder will perform their regular and customary duties for the Company until one of the parties has failed to comply with any final decision of the Impartial Umpire or an arbitrator pursuant to Article XX.

ABC further argued that, because Section 20.10 of the agreement provides that one party may pursue arbitration when it believes the other is about to violate Section 5.1, ABC was entitled to arbitration of the dispute. Section 20.10 provides in pertinent part:

> Notwithstanding any of the foregoing provisions of this Article XX, if a party to the Agreement claims that there will be a violation of Article V, . . . such party shall have the right to file a grievance directly with the Impartial Umpire setting forth such claim, demanding injunctive relief, and invoking the expedited arbitration procedure set forth below. However, this Section 20.10, which is applicable only to actions not yet effectuated, shall be used only if time does not permit the processing of the grievance under the other sections of Article XX . . . . Under the expedited procedure, the arbitration hearings shall commence at the earliest possible availability of the Impartial Umpire, but in no event no more than twenty-four (24) hours after the grievance has been filed . . . .
>
> . . . .
>
> . . . The award of the Impartial Umpire shall be rendered at the earliest possible time and in any event no later than twenty four (24) hours after the hearing has been closed . . . . The Impartial Umpire

> shall be empowered under this procedure to order injunctive relief or such other remedy as he or she deems appropriate if the Umpire finds there has been or will be a violation of one of the provisions [of Article V].

NABET disputed both that the underlying dispute was arbitrable and that the activities in Hawaii violated Section 5.1 of the agreement.

On December 17, 1996, the Umpire concluded that he had authority under the agreement to determine the arbitrability of the dispute and that the dispute between ABC and NABET was arbitrable. The next day, the Umpire conducted a hearing on the merits of the grievance. Continuing to challenge the Umpire's determination of arbitrability, NABET did not participate in this hearing. On December 19, the Umpire determined that NABET had violated Section 5.1 of the collective bargaining agreement and ordered it not to interfere with ABC's broadcast of the Aloha Bowl. The Umpire also retained jurisdiction to consider ABC's request for additional injunctive relief regarding the broadcasts of the Pro Bowl scheduled for February 2, the Battle of the Gridiron to be taped on January 30 and broadcast on February 2, and the Hawaiian Open scheduled for February 15-16.

Although NABET did not participate in the Umpire's hearing on the merits of the dispute or ask a court to enjoin the arbitration, it brought the present action seeking, *inter alia*, to vacate the arbitrator's awards on both arbitrability and the merits. The district court independently determined that the dispute between NABET and ABC over the Aloha Bowl, as well as any future similar dispute between the parties, was arbitrable, and confirmed both awards.

A few days later, ABC requested another hearing before the Umpire to seek relief against NABET's planned

disruptive activities at the Pro Bowl and other ABC events in Hawaii. NABET initially stated that it would participate but later accused the Umpire of bias and failed to appear. The Umpire held the hearing in NABET's absence and, on January 22, 1997, issued an award prohibiting NABET from interfering with ABC's February sporting events in Hawaii.

In January 28, ABC sought an order of contempt against NABET and a confirmation of the January 22 Award. The district court confirmed the Award but declined to hold NABET in contempt until a full factual record could be developed. NABET has appealed from the confirmation of the various arbitration awards.

DISCUSSION

NABET advances two primary arguments on appeal, namely, that the dispute was not arbitrable and that, even if it were arbitrable, the awards are nevertheless void because the issue of arbitrability was not determined by a court prior to arbitration.

A. *Arbitrability of the Dispute*

Review of a district court's determination that a dispute is arbitrable is *de novo, see ConnTech Dev. Co. v. University of Conn. Educ. Properties, Inc.*, 102 F.3d 677, 683 (2d Cir. 1996), and such questions generally are resolved in favor of arbitration. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985). A grievance is arbitrable "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). The district court ruled that NABET at least arguably violated Section 5.1 of its collective bargaining agreement with ABC and this viola-

tion entitled ABC to arbitration under Section 20.10 of the agreement. We agree.

Section 5.1 of the collective bargaining agreement prohibits NABET's "interference with [ABC's] Company operations," and Section 20.10 authorizes the parties to arbitrate claims of imminent violations of Section 5.1. NABET contends that because disruption of the broadcast of the designated sporting events was not to take place in the continental United States, such acts could not fall within Section 5.1.

However, Section 5.1 is "susceptible of an interpretation that covers the asserted dispute." *AT&T Technologies*, 475 U.S. at 650. The phrase "Company operations" as used in this Section arguably encompasses all ABC operations, including those outside the continental United States, even though the balance of the agreement governs terms and conditions of employment of NABET members in the continental United States. It strains neither the language of the agreement nor common sense to conclude that in Section 5.1, NABET promised peace to ABC wherever it operated and not just in the continental United States. We cannot say with "positive assurance" that Section 20.10 does not confer jurisdiction on the arbitrator to decide the current dispute, and we must, therefore, presume the dispute's arbitrability. *See id.*

B. *NABET's Entitlement to a Second Arbitration*

NABET also argues that it is entitled to a second arbitration because a judicial determination of arbitrability must, as a matter of law, precede arbitration whenever arbitrability is disputed. According to NABET, this order of proceedings is legally compelled even when the party disputing arbitrability is positioned to, but does not, seek a court order enjoining the arbitration. In NABET's words, the arbitrator's "decision to proceed with the arbitration *prior to* a judicial determination that the [agreement] creates a duty to arbitrate makes any award null

and void." Appellant's Brief at 24. For support, NABET cites language in a number of opinions, including *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 547 (1964), in which the Supreme Court stated that "compulsory submission to arbitration cannot *precede* judicial determination that the collective bargaining agreement does in fact create such a duty" (emphasis added). *See also AT&T Technologies*, 475 U.S. at 651 ("*If* the court determines that the agreement [requires arbitration], *then* it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement.") (emphasis added); *Stotter Div. of Graduate Plastics Co. v. District 65, UAW*, 991 F.2d 997, 1000 (2d Cir. 1993) (whether dispute is subject to arbitration is "threshold" determination).

While the quoted language lends marginal support to NABET's position, we do not believe that it mandates the rule asserted by NABET. We see no reason why arbitrability must be decided by a court before an arbitration award can be made. If the party opposing arbitration desires that order of proceedings, it can ask a court to enjoin arbitration on the ground that the underlying dispute is not arbitrable. If it does not seek to enjoin the arbitration, it can raise the arbitrability issue in a judicial confirmation proceeding. *See Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1510 (3d Cir. 1994) ("A party does not have to try to enjoin or stay an arbitration proceeding in order to preserve its objection to jurisdiction . . . . A jurisdictional objection, once stated, remains preserved for judicial review absent a clear and unequivocal waiver."), *aff'd*, 514 U.S. 938 (1995). If arbitrability is rejected after the award, the party opposing arbitration will have obtained the relief sought. If arbitrability is upheld after the award, there is no reason for a court not to confirm the arbitrator's award. *See, e.g., First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 941, 946-47 (1995) (confirming arbitrator's award after arbitrator decided he had authority to decide his juris-

diction and found his jurisdiction extended to dispute at hand). In such a case, the party opposing arbitration will have obtained a judicial ruling, although adverse, on arbitrability. There is thus nothing to be gained by adopting NABET's proposed rule.

There is, moreover, much to be lost. Indeed, the proposed rule would frustrate a fundamental goal of arbitration: to provide a simple and expeditious alternative to litigation. *See Mitsubishi Motors*, 473 U.S. at 628. Under NABET's view, arbitration proceedings must come to a halt, and the party seeking arbitration must bear the burden of obtaining a favorable ruling whenever a party disputes arbitrability. If any and all objections to arbitrability were enough to halt the process pending a court order compelling arbitration, a non-grieving party would have an incentive to raise meritless arbitrability issues, particularly where, as here, time is of the essence. Indeed, the rule proposed by NABET is hardly in the interests of unions and their members generally, because they, rather than employers, file the vast majority of grievances under collective agreements. Finally, under NABET's proposed rule, parties would have an incentive to object to arbitrability in order to receive two bites at the apple. A party could object to the arbitrator's jurisdiction, yet wait for the arbitration award to be issued safe in the knowledge that if the award is unfavorable, it can demand a second arbitration.

NABET does not contest the merits of the arbitrator's award. Because the dispute between NABET and ABC was arbitrable and NABET is not entitled to a second chance at arbitration, the awards must be confirmed.

We therefore affirm.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of June one thousand nine hundred and ninety-eight

Present: HON. WINTER
Chief Judge

HON. VAN GRAAFEILAND
HON. MCLAUGHLIN
Circuit Judges,

Docket No. 97-7010

NAT'L ASSOC. OF BROAD.,
Appellant

v

ABC, INC.,
Appellee

A petition for rehearing having been filed herein by National Association of Broadcast Employees & Technicians, The Broadcasting and Cable Television Workers Sector of the Communications Workers of America, AFL-CIO, CLC. Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

FOR THE COURT
GEORGE LANGE III
Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR
Administrative Attorney

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

August 17, 1998

Mr. David A. Mintz
Weissman & Mintz
80 Pine Street, 33rd Floor
New York, NY 10005

Re: National Association of Broadcast Employees & Technicians, etc.
v. ABC, Inc., et al.
Application No. A-143

Dear Mr. Mintz:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Ginsburg, who on August 17, 1998, extended the time to and including November 9, 1998.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER,
Clerk

By /s/ Jeffrey D. Atkins
JEFFREY D. ATKINS
Assistant Clerk

APPENDIX D

STATUTORY PROVISIONS INVOLVED

Norris-LaGuardia Act

Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104, provides:

> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> (b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in Section 3 of this Act;
>
> (c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;
>
> (d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in Section 3 of this Act.

Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, provides:

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may

be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Section 8 of the Norris-LaGuardia Act, 29 U.S.C. § 108, provides:

> No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Section 9 of the Norris-LaGuardia Act, 29 U.S.C. § 109, provides:

> No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein.

Section 13 of the Norris-LaGuardia Act, 29 U.S.C. § 113, provides:

> When used in this Act, and for the purposes of this Act—
>
> (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations or employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).
>
> (b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.
>
> (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employ-

ment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Supreme Court, U.S.
FILED
DEC 2 1998
CLERK

No. 98-716

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, THE BROADCASTING AND CABLE TELEVISION WORKERS SECTOR OF THE COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, CLC,

Petitioners,

vs.

ABC, INC. and HERBERT FISHGOLD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT ABC, INC.

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44 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should this Court grant certiorari because the Impartial Umpire designated by the parties' labor agreement rendered arbitration awards in the face of the Union's objection to arbitrability where the District Court and the Second Circuit each reviewed the awards *de novo* and properly held that the dispute at issue was arbitrable under the terms of the parties' collective bargaining agreement?

2. Should this Court grant certiorari to address whether the Norris-LaGuardia Act prohibits a party from seeking an injunction to stay arbitration where (i) the Petitioner never sought any stay of arbitration, whether by injunction, or otherwise; (ii) the reviewing courts did not consider or reach that issue; and (iii) such a determination is not necessary to the proper resolution of this action?

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

The Walt Disney Company

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APPENDIX

Appendix A — Decision and Order of Impartial Umpire Dated December 19, 1996 (attaching Interim Order of Impartial Umpire Dated December 17, 1996) 1a

STATEMENT OF THE CASE

This action arises out of labor arbitrations concerning the National Association of Broadcast Employees and Technicians's (the "Union" or "NABET") attempted interference with ABC Inc.'s ("ABC") staffing of the nationwide broadcast of several important sporting events in Hawaii, commencing with the Aloha Bowl on December 25, 1996, followed by the Battle of the Gridiron (January 30, 1997); the Pro Bowl Football game (February 2, 1997) and the Hawaiian Open golf tournament (February 15-16, 1997).

In and about October, 1996, ABC began the process of hiring staff for the Aloha Bowl broadcast. As it had in the past with regard to these events, as well as other broadcasts originating from Hawaii and other locations outside of NABET's jurisdiction, ABC negotiated directly with freelancers that it sought to hire for these events.

At the time these events were scheduled to be broadcast, ABC and NABET were parties to a collective bargaining agreement which was due to expire on March 31, 1997 (the "Master Agreement" or the "Agreement"). Pursuant to Section 7.1 of the Agreement, the Company is not required to apply the NABET Agreement's terms and conditions of employment when hiring freelancers to perform broadcast engineering work in foreign countries and territories, territories of the United States, and the states of Alaska and Hawaii.

Accordingly, for decades, ABC has openly and regularly hired individuals on a freelance basis to work on broadcasts outside the continental United States on terms other than those provided by the Agreement. The Union has repeatedly made bargaining demands during negotiations over the years to expand the territorial reach of the Agreement, but the parties have always reached a negotiated settlement with the geographic breadth of the Agreement remaining unchanged.

On or about October 25, 1996, NABET began engaging in a course of conduct intended to disrupt the Company's right to hire freelancers for the Aloha Bowl and to derail the planned broadcasts. NABET contacted these freelancers, most of whom are NABET members and work under the Agreement when performing ABC assignments within the Continental United States, and threatened these members that it would fine, expel, and otherwise retaliate against them, if they accepted the freelance work for ABC in Hawaii. As a direct result of these threats and coercion, ABC was informed by 75% of the individuals who had agreed to work the Aloha Bowl (scheduled to air on December 25, 1997) that they must regretfully decline these assignments. Other freelancers expressed concern about making any commitment to ABC to perform this work, due to the Union's threats of retaliation, picketing and surveillance. Moreover, about 60% of the freelancers who had agreed to work the Pro Bowl (scheduled for February 2, 1997) advised ABC they would not work due to NABET's pressure tactics.[1]

Accordingly, on December 6, 1996, pursuant to Section 20.10 of the Master Agreement, ABC filed a grievance and demanded expedited arbitration before Herbert Fishgold, the longstanding special Impartial Umpire under the Agreement (the "Umpire"), asserting that NABET's actions were in violation of the "non-interference with operations" provision, Article V, § 5.1, of the Agreement.[2]

---

1. ABC was unable to staff the events with its own hires and was compelled to retain a subcontractor in Hawaii to provide technical staff. This forced ABC to rely on individuals with whom it had never before worked, and whose skills and experience was largely unknown to ABC. Not surprisingly, ABC had grave concerns about the quality of the planned broadcasts.

2. NABET mischaracterizes the nature of its activities as "organizing activities" (Petition at 3) claiming, without merit, that ABC (Cont'd)

Article V, § 5.1 provides in pertinent part:

> It is agreed that there will be no stoppage of work, lockout *or other interference with Company operations* . . . until one of the parties has failed to comply with any final decision of the Impartial Umpire or an arbitrator pursuant to Article XX. (Emphasis supplied).

Where there is a claim of a violation of the non-interference provision of the Agreement, Section 20.10 *inter alia* provides for a hearing within 24 hours after the grievance has been filed.

> If a party to the Agreement claims that there will be a violation of Article V . . . such party shall have the right to file a grievance directly with the Impartial Umpire setting forth such claim, demanding injunctive relief, and invoking the expedited arbitration procedure set forth below. . . . Under the expedited procedure, the arbitration hearings shall commence at the earliest availability of the Impartial Umpire, but in no event more than twenty-four (24) hours after the grievance has been filed with the Impartial Umpire unless the grieving party consents to an extension of time.

ABC sought an immediate and expedited hearing within 24 hours concerning NABET's interference with Company operations. The Union objected and claimed that Umpire

---

(Cont'd)
was attempting to restrain "the Union's lawful activities outside the scope of contractual coverage." As the Impartial Umpire found, and the reviewing courts affirmed, the actions complained of by ABC were within the scope of Article V of the Master Agreement. In any event, the merits of the arbitrator's awards are not at issue here.

Fishgold had no jurisdiction to hear the matter as the disputed conduct occurred outside the continental United States, but never sought to stay arbitration or otherwise seek judicial resolution of the issue. After telephone conferences between Umpire Fishgold and the parties over scheduling the arbitration, on December 11th, the Umpire gave the Union the opportunity to brief its argument challenging his jurisdiction and also permitted the Company to be heard on the matter . The parties made their submissions, but the Union reserved its right to contest the Umpire's jurisdiction.

On December 17, 1996, after considering the parties' written submissions, Umpire Fishgold, issued a ruling that ABC's grievance was within his jurisdiction "since what I am being asked to do is interpret Section 5.1 and its application, if any, to the broadcast of the Aloha Bowl from Hawaii on December 25, 1996" (the "December 17th Award"). Resp. App. at 18a. Therefore, the Umpire ordered that he would conduct a hearing on the merits on December 8, 1996 at 10:00 a.m. in New York.

On December 18, 1996, the Union did not appear for the hearing until telephoned by Umpire Fishgold. Then, with no advance notice, the Union refused to participate in the hearing, instead serving both ABC and the Umpire (who was named as an individual Defendant) with copies of a complaint requesting that the district court vacate the Umpire's December 17, 1996 award. NABET did not commence its action by order to show cause and did not seek a temporary restraining order.

Absent an application for a stay or TRO, the Umpire continued the hearing after Union counsel's walkout, took testimony and other evidence from ABC, and on December 19, 1996, issued an Opinion and Award (the "December 19th

Award").[3] Umpire Fishgold's award prohibited the Union from, among other things, expelling, fining, threatening to expel or fine freelancers for working the Aloha Bowl or from picketing or engaging in other interference with the broadcast of the Aloha Bowl. The arbitrator retained jurisdiction in order to consider Company requests

---

3. Faced with NABET's boycott of the hearing Umpire Fishgold carefully reviewed the Union's Summons and Complaint, and the entire course of action with respect to the grievance, and determined the hearing should proceed, stating:

> The Union could have presented its arguments as to Section 5.1's application, and if I found 5.1 to be applicable, and further found the Union's conduct to be violative of Section 5.1, my Award would issue within 24 hours. The Union could then have filed a petition to vacate the Award at that time, as it did in *NN 37-1*. [confirmed *Nat'l Ass'n of Broadcast Employees & Technicians v. Nat'l Broadcasting Co.*, 707 F. Supp. 124 (S.D.N.Y. 1988)] It would appear that the Union would have been no worse off on December 19 than it was on December 18. Further, they could have filed their complaint and sought a TRO to stay the implementation of my Award until the Court ruled. They also could file with the NLRB, and seek similar temporary relief pending final ruling by the Board.
>
> Instead, it has chosen to wait until December 18, and, in not seeking a TRO, to leave the telecast of the Aloha Bowl, which must occur live on December 25, in limbo.
>
> Inasmuch as the Union has chosen this approach, and for all the reasons previously discussed above, I determined to proceed, *ex parte*, to hear the Company's arguments regarding Section 5.1, and, in the absence of any restraining order, to render an Award.

Resp. App. at 5a-6a.

> for additional injunctive relief with regard to the future broadcasts of the Pro Bowl, Battle of the Gridiron, and the Hawaiian Open, and for possible punitive and/or compensatory damages.

Resp. App. at 15a.

Immediately thereafter, ABC moved by order to show cause to have both the December 17th and 19th Awards confirmed by the District Court.

On December 30, 1996, the District Court heard oral argument on ABC's motion to confirm and NABET's cross-motion to vacate the December 17th and 19th arbitration awards. The district court conducted a *de novo* review of the arbitrability issue, holding that the dispute was within the scope of the arbitration clause at issue and that the awards drew their essence from the Agreement. The court rejected the Union's contention that *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), prohibited the arbitrator from proceeding in the absence of a pre-arbitration judicial determination of jurisdiction. The court further noted that it had the judicial authority to "resolve that question in the context of a motion to confirm and a motion to vacate."[4]

The court also treated the motions as motions to compel and/or stay arbitration and found that future anticipated disputes

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4. NABET mischaracterizes the court's opinion as upholding the arbitrator's right to determine his own jurisdiction. Rather, the court found that in the circumstances, the arbitrator proceeded reasonably and the court affirmed that the arbitrator's jurisdiction to issue the award was proper because the *court* determined the dispute had always been arbitrable. More importantly, the court did not find, as the Union claims, that the Union waived its right to seek judicial determination of the arbitrator's authority to decide substantive arbitrability. Petition at 5. Rather, the essence of the decision was that the Union could have, but declined to, seek a pre-arbitration judicial determination and, as such, had waived its right to contest the award as void on that basis alone.

with regard to the upcoming Hawaii broadcasts were thereby compelled to arbitration.

As anticipated, a further dispute arose regarding the upcoming broadcasts and ABC again invoked the arbitration clause. Umpire Fishgold set a hearing date of January 12, 1997, which was adjourned until January 17 upon request of the Union with the consent of ABC. Nevertheless, notwithstanding the district court's pre-arbitration determination that such a dispute was arbitrable, 24 hours before the arbitration was to take place, the Union sent a letter stating it would not participate, this time on the grounds that the Umpire was biased.

A hearing was held as scheduled, without the Union's participation, and on January 22, 1997, the Umpire issued an award (the "January 22nd award") finding that NABET had not informed its members of the District Court's December 30th order and that the Union was continuing to discourage its members from working the Hawaiian assignments subsequent to the district court's December 30th Order. Pursuant to Section 20.10, the Umpire issued an order prohibiting the Union, its officers, employees and agents from *inter alia*: fining, expelling from membership, interfering with obtaining future work, censuring or otherwise acting in any manner with the intent or effect of coercing or retaliating against any freelancers who desired assignments for the Aloha Bowl, the Pro Bowl, the Battle of the Gridiron or the Hawaiian Open.

Because there was no reasonable basis for believing that NABET would comply with the January 22nd award and ABC would continue to suffer immediate and irreparable injury, loss and damages, ABC again returned to the district court to request that the Court not only confirm the January 22nd award, but also issue an order holding NABET in civil and criminal contempt. The district court heard argument on ABC's motion.

NABET's counsel raised the same objections it had to the Court's earlier confirmation of the December 17th and 19th Awards, which the Court again rejected. Thereafter, the Court signed an order confirming the January 22nd Award and holding ABC's motion for civil and criminal contempt in abeyance pending the development of a full factual record.

Upon appeal to the Second Circuit, the Union advanced two arguments, namely that the dispute was not arbitrable and even if it were, the awards should be declared illegal and void because the arbitrator had decided his own jurisdiction, without the benefit of a pre-arbitration judicial determination of substantive arbitrability. The Second Circuit, upon *de novo* review, affirmed the District Court's determination that the dispute was arbitrable. Following decades of this Court's precedents, the appellate court observed that "[a] grievance is arbitrable 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' " *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 650 (1986); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); *Nat'l Ass'n of Broadcast Employees & Technicians v. ABC, Inc.*, 140 F.3d 459, 461 (2d Cir. 1998). Applying this Court's test of arbitrability the Second Circuit concluded that NABET at least arguably violated Section 5.1 of the parties collective bargaining agreement which prohibits "interference with Company operations" authorizing arbitration under Section 20.10 of the Agreement, observing that:

> It strains neither the language of the agreement nor common sense to conclude that in Section 5.1, NABET promised peace to ABC wherever it operated and not just in the continental United States. We cannot say with "positive assurance" that

> Section 9.10 does not confer jurisdiction on the arbitrator to decide the current dispute, and we must, therefore, presume the disputes' arbitrability.

140 F.3d at 462.

The Second Circuit also rejected the Union's contention that *AT&T Technologies, Inc.* and *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) compelled that a judicial determination of arbitrability precede arbitration whenever arbitrability is disputed. The circuit court held that as a matter of law there is no obligation for a judicial determination of arbitrability to precede an arbitration. Rather the court held that

> *[i]f the party apposing arbitration desires that order of proceedings,* it can ask a court to enjoin arbitration on the ground that the underlying dispute is not arbitrable. *If it does not seek to enjoin the arbitration,* it can raise the arbitrability issue in judicial confirmation proceeding.

Nat'l Ass'n of Broadcast Employees & Technicians, 140 F.3d at 462.

The court found that the Union, by its objections at arbitration regarding arbitrability, had preserved its right to a judicial review of arbitrability, and upon *de novo* review of that issue, affirmed the District Court's determination that the dispute was arbitrable.[5]

5. The Second Circuit noted that NABET did not contest, as it does not here, the merits of any of the arbitrator's awards each of which the district court confirmed as "draw[ing] its essence" from the collective bargaining agreement. *See United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

REASONS FOR DENYING THE WRIT

I.

THE SECOND CIRCUIT'S CONFIRMATION OF THE ARBITRATION AWARDS IS CONSISTENT WITH THIS COURT'S PRECEDENT.

Both the District Court and the Second Circuit reviewed the arbitration awards and, undisputedly applying the proper standards, found that the dispute was arguably within the scope of the arbitration provision of the Master Agreement. *See United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (arbitration of a particular grievance "should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.") (emphasis supplied); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (an arbitrator's award is legitimate so long as "it draws its essence from the collective bargaining agreement"). Petitioners cannot and do not claim that the arbitration awards should be vacated because the arbitrator incorrectly determined that the disputes at issue were covered by the arbitration clause in the Agreement.

Rather, Petitioners, in reliance on *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986) and *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), argue that the awards were null and void and should be vacated because a court determination of arbitrability did not *precede* the arbitration. Although both *AT&T* and *John Wiley & Sons, Inc.* held issues of arbitrability are for the court's review, this Court did not rule in either case, and has never ruled, that an arbitrator must stay himself from hearing a dispute where no

judicial resolution has been sought simply upon a party's assertion of lack of jurisdiction.

Indeed, NABET does not, and cannot, cite a single case that supports it claim that the three awards could not be confirmed because the arbitrator allegedly decided arbitrability. The courts considering the issue have routinely confirmed such awards. *See Stotter Div. of Graduate Plastics Co. v. District 65, UAW*, 991 F.2d 997, 1000 (2d Cir. 1993) (confirming award although arbitrator allegedly "had engaged in misconduct" by determining issue of arbitrability); *Nat'l Ass'n of Broadcast Employees & Technicians v. NBC*, 707 F. Supp. 124 (S.D.N.Y. 1988) (Umpire's award confirmed despite NABET's claim that umpire exceeded his authority in conducting arbitration and despite union's refusal to participate. Refusal to participate not necessary to preserve right to object to arbitrability).

The court below observed that no prior decision of this Court compelled a pre-arbitration judicial determination of arbitrability. Rather, the appellate court concluded that if the Union preferred such a result it could have sought a stay of arbitration. Alternatively, the Union could (and did) obtain a review of arbitrability on a motion to vacate the award or in opposition to a motion to confirm same. In support of the latter option, it cited this Court affirmation of an opinion of the Third Circuit that allowed a post hearing review of arbitrability and of an arbitrator's award where the hearing had proceeded despite the protests of the individual defendants that they had not agreed to arbitrate the dispute. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995) (affirming *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3rd Cir. 1994). In *Kaplan*, the court vacated that part of the award that applied to the individual defendants because it determined that they were not parties to the arbitration agreement. Significantly, the court stated not that the award must be vacated because the arbitrator decided

arbitrability on his own, but because the parties, by objecting, has reserved their right to a judicial review of the issue.

In fact, the Third Circuit, consistent with the holding of the Second Circuit here, has stated that *AT&T's* holding merely restated the court's long held position that "arbitration will not be

> *compelled by a federal court* unless a prior determination as to arbitrability is made by the court. . . . Our review of the *AT&T* decision reveals that the Supreme Court did not expand on its prior holdings and did not state or imply that an arbitration proceeding should be enjoined until a determination as to arbitrability be made.

Lukens Steel Company v. United Steelworkers of America, 989 F.2d 668, 679 (3rd Cir. 1993).

Contrary to Petitioners' assertions, the Second Circuit did not hold that an arbitrator may decide his own jurisdiction if the party contesting arbitrability does not seek to enjoin the arbitration. Rather, the circuit court simply held that where an objecting party does not seek to enjoin the arbitration, the review of arbitrability will take place after the hearing rather than before it. Additionally, the Second Circuit noted that adoption of NABET's proposal requiring prior judicial determination of arbitrability would frustrate the arbitration process and offer an incentive to non-grieving parties (who the court observed are typically employers) to raise arbitrability claims, particularly where, as in the underlying dispute here, time is of the essence. The Second Circuit's holding is consistent with the other districts and circuits that have considered this issue and with this Court's prior holdings and does not warrant review by this Court.

II.

THE ANTI-INJUNCTION PROVISIONS OF THE NORRIS-LAGUARDIA ACT ARE NOT AT ISSUE AND DO NOT WARRANT THIS COURT'S REVIEW.

The courts below did not reach the second and third questions posed by Petitioners, nor is a resolution of those questions required in this action. Contrary to the Union's contention, the Second Circuit's ruling does not require a party challenging arbitration to seek an injunction; an act which the Union alleged may be prohibited by the Norris-LaGuardia Act. Petitioners neither sought nor were denied a stay of arbitration, by injunction or otherwise, nor did they seek any other judicial determination of arbitrability prior to the arbitrations even though, as both the district court and the arbitrator noted, they had ample opportunity to do so.[6] Indeed, Petitioners' argument is specious because they could have obtained judicial review short of an injunction by commencement of an action seeking a declaratory judgment and could have done so by Order to Show Cause.[7]

In an attempt to create a reviewable issue where none exists, Petitioners mischaracterize the holding of the Second Circuit.

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6. If, as Petitioners claim, the Second Circuit "reprimanded" them (Petition at 9), it was likely because that court, like the district court and Umpire Fishgold understood that the purpose of Petitioners' procedural wrangling was to delay the proceedings sought by ABC until after the dates that the time sensitive broadcasts were to be aired.

7. ABC's grievance was filed on December 6, 1998, the parties' submissions to the arbitrator were not due until December 16. Petitioners had ample opportunity to move by order to show cause for declaratory judgment or other relief to determine arbitrability. Indeed, Umpire Fishgold indicated that if any such relief had been applied for he would not have proceeded with the hearing. Resp. App. at 6a.

The court did not premise its interpretation of *AT&T* upon "a legal option that violates the anti-injunction provisions of the Norris-LaGuardia Act. . . ." Petition at 8. The court merely observed that had the Union truly desired a pre-arbitration judicial determination of arbitrability could have brought an action to stay arbitration.[8] The Second Circuit, faced with a situation where no pre-arbitration judicial relief of any type had been sought, held that it was not required by *AT&T* to vacate the arbitration awards because Petitioners had reserved during arbitration their right to a *de novo* judicial review — a review that determined the award was properly rendered within the scope of the agreement. Thus, the purported conflict among the circuits regarding the lawfulness of enjoining arbitrations is irrelevant.

In light of the Second Circuit's holding that the underlying dispute was arbitrable and the awards were not rendered illegal for lack of a pre-arbitration judicial determination of arbitrability, holdings which are consistent with this Court's precedent, as well as all of the other circuit and district courts considering the issue, any review by this Court of the anti-injunction provisions of the Norris-LaGuardia Act is unnecessary and entirely unwarranted. A resolution of any purported conflicts among the circuits regarding the application of those provisions to a stay of arbitration to determine arbitrability would have no effect on the outcome of this action.

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8. The disingenuous nature of the Union's claims is fully revealed by its assertion that all the awards are illegal due to the absence of a prior judicial determination of arbitrability. However, the January 22 arbitration (in contrast to the December 17 and 19 awards) award, was issued only after the District Court had found ABC's grievance arbitrable and had compelled NABET to arbitrate the dispute.

CONCLUSION

Based on the foregoing, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION AND ORDER OF IMPARTIAL UMPIRE DATED DECEMBER 19, 1996 (ATTACHING INTERIM ORDER OF IMPARTIAL UMPIRE DATED DECEMBER 17, 1996)

AIO 96-01
Article 20.10

In the Matter of Arbitration Between

ABC, Inc.

and

NABET/CWA

DECISION AND ORDER

On December 17, 1996, the Arbitrator issued an Interim Order, Attachment 1, in which he determined that he had the jurisdiction to decide the issue of subject matter arbitrability. That Interim Order is incorporated herein, and the Arbitrator will not repeat the chronology of events which are contained in the Interim Award.

The Interim Award was faxed to Mr. Ralph Phillips, designated counsel for NABET, at NABET's New York office, per his request, shortly before noon on December 17, and was then faxed to Marc Sandman, counsel for ABC, Inc.

Prior to arriving in New York on December 18 for the hearing scheduled by the Interim Award, the Arbitrator received no communication from the Union as to the status of their continuing participation in these 20.10 proceedings.

At 10:15 a.m. on December 18, the Arbitrator called NABET offices to find out if NABET would be participating

in the hearing. Mr. Phillips advised me that someone would be there in ten minutes. At approximately 10:30 a.m. an attorney representing NABET arrived and served the Arbitrator and Company counsel with a Civil Complaint filed in the U.S. District Court for the Southern District of New York, seeking to vacate my Interim Award, and also seeking permanent injunctive relief against ABC and the Arbitrator for "our interference with the rights of NABET to organize and seek representation of daily hire employees by ABC at overseas locations but not covered by a collective bargaining agreement." The Complaint goes on to claim "by their actions, defendants have violated and are continuing to violate Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C., §157.

In a cover letter to the Arbitrator delivered at the same time, Mr. Phillips admonished the Arbitrator:

> ". . . In no event does the Union expect you to proceed at the unilateral invitation of the Company since doing so will only further prejudice the Union's rights and any award you choose to issue will undoubtedly be reversed."

A careful review of the timing of the events leading up to the December 18, 1996 hearing serves to call into question the validity of the Union's admonishment.

The Company began contacting individual freelance per diem employees in early October, 1996, and had received verbal commitments as to terms and conditions of the Aloha Bowl assignments in late October. As early as the November 1, 1996 exchange of letters between John Krieger, Network Coordinator for NABET/CWA and Jeff Ruthizer, Vice President of Labor

Relations for ABC, Inc., the Union contended therein, that what the Company was doing was declining to examine the Union's proffered proof of majority status vis-a-vis these employees; declining to bargain with the Union over this subject; and intending to continue to deal directly with its daily hire employees without regard to the Union's representational claim.

By the claim set forth in their Complaint, the Union has confirmed what was evident from their prior filings with me, to wit that this dispute is really over the lawful rights of the Union and its represented daily hire engineers assigned by the Company to work entirely outside the scope of the Master Agreement to bargain over their terms and conditions of employment.

If this is, in fact, the Union's contention, as appears confirmed by their Court papers, the extent to which the Company has either contractually or statutorily refused to deal with the Union, and any issue as to what rates of pay and other terms should apply to these assignments, are questions which could be addressed through the grievance-arbitration procedure of the Master Agreement and/or through the filing of unfair labor practice charges with the NLRB.

Yet, despite having raised these very issues with the Company as early as November 1, 1996, the Union has not utilized the grievance machinery nor filed any charges with the NLRB. And, despite proclaiming a prejudice to its rights, what with the imminence of the telecast of the Aloha Bowl on December 25, 1996, not only declined to participate in the 20.10 hearing, but even, in its Civil Complaint, did not seek immediate relief in the form of a Temporary Restraining Order to prevent

continuation of the 10.10 proceeding. Rather, the defendants are given 20 days to respond, which takes us well past December 25.

Turning briefly to a further comment on the Interim Award, the Arbitrator believes that, for reasons stated therein, Section 20.10, a provision agreed to by the parties in collective bargaining, confers the basic jurisdiction on the Arbitrator, who is specifically named as the 20.10 Arbitrator therein, to determine whether to proceed with a 20.10 grievance. All I determined in my Interim Award was that a hearing would be held to determine, first, whether Article 5, and particularly Section 5.1, applied to the instant matter — the broadcast of the Aloha Bowl from Hawaii using per diem employees whose terms and conditions were "negotiated" between them and the Company, without NABET's participation. Only if I were to find Section 5.1 to be applicable, would I then determining whether the alleged conduct of the Union, if proven, violated Section 5.1's prohibitions.

One of the prior arbitration awards referred to in the Interim Award supports the Arbitration's actions herein as to exercising subject matter jurisdiction and conducting a 20.10 hearing, even in the face of the Union's objection. In *NBC-NN 87-1*, Arbitrator George Nicolau conducted such an ex parte 20.10 hearing and, over the Union's objection, determined that Section 5.1 precluded the Union from its threatened picketing of a taping of a training exercise to prepare for a NABET strike. More will be said about this Award when the Arbitrator turns to the applicability of Section 5.1.

However, with regard to the arbitral jurisdiction over 20.10 grievances, Judge Cedarbaum, in *87 Civ. 387* (USDC, SDNY)

denied NABET's petition to vacate the Award in NN 87-1. In finding that Arbitrator Nicolau did not exceed his authority, Judge Cedarbaum noted:

> ". . . Article V provides among other things that the Union will not interfere with Company operations. The umpire determined that the training sessions were Company 'operations' . . ."

Judge Cedarbaum then determined that the 20.10 grievance satisfied the prerequisite set forth in 20.10 and concluded: "Since the prerequisites for an expedited arbitration hearing pursuant to §20.10 were all satisfied, the umpire did not exceed his authority by conducting such a hearing." The Arbitrator believes that the same conclusion is warranted with regard to the present 20.10 proceeding, as set forth in the Interim Award.

While it is true that the Aloha Bowl will be broadcast on December 25, it is also true that any contractual and/or NLRB relief arising therefrom, should the Union ultimately prevail, can be addressed under the Master Agreement and by the NLRB.

Moreover, the procedure adopted by the Arbitrator herein was initially only to address the Aloha Bowl. While it is also true that the Company has identified other sports pickups from Hawaii for late January-February, 1997, the Union could have presented its arguments as to Section 5.1's application, and if I found 5.1 to be applicable, and further found the Union's conduct to be violative of Section 5.1, my Award would issue within 24 hours. The Union could then have filed a petition to vacate the Award at that time, as it did in *NN 87-1*. It would appear that the Union would have been no worse off on December 19 than it was on December 18. Further, they could

have filed their complaint and sought a TRO to stay the implementation of my Award until the Court ruled. They also could file with the NLRB, and seek similar temporary relief pending final ruling by the Board.

Instead, it has chosen to wait until December 18, and, in not seeking a TRO, to leave the telecast of the Aloha Bowl, which must occur live on December 25, in limbo.

Inasmuch as the Union has chosen this approach, and for all the reasons previously discussed above, I determined to proceed, *ex parte*, to hear the Company's arguments regarding Section 5.1, and, in the absence of any restraining order, to render an Award.

Section 5.1

While the purpose of the prior submissions to the Arbitrator were to address the arbitrability jurisdiction, both submissions also raised the applicability, or lack thereof, of Section 5.1. In his cover letter of December 18, 1996, Mr. Phillips again asserts that in proceeding I have "ignored the long-accepted arbitrable principle applicable here that Section 5.1 is not applicable to assignments not covered by the Master Agreement."

Before responding to that contention, it is necessary first to place the instant grievance in context. Pursuant to Section 7.1 of the Master Agreement, the Company does not apply the Master Agreement's terms and conditions of employment when having persons to perform broadcast engineering work in foreign countries and territories, territories of the United States, and the states of Alaska and Hawaii.

Appendix A

Herein, the Company has hired or will hire persons on a non-NABET basis for a series of sporting events in Hawaii: the Aloha Bowl college football game (December 25, 1996), the Battle of the Gridiron football game (to be taped on January 30 and broadcast on February 2, 1997), the Pro Bowl football game (February 2, 1997), and the Hawaiian Open golf tournament (February 15-16, 1997).

Except for the Battle of the Gridiron, which will be taped and later aired with the Pro Bowl, ABC intends to broadcast these contests live. The feeds from Honolulu, Hawaii will be sent to New York City via satellite, and will then be broadcast over the ABC television network. As it has in the past with regard to these events, as well as other broadcasts originating from Hawaii and other locations outside of NABET's agreed-upon jurisdiction, ABC has negotiated directly with the freelance personnel that it wishes to hire for these pickups. Many of these freelancers are NABET members, and work under the Master Agreement when performing Company assignment within the continental United States.

Having reviewed the cited Awards, it is clear to the Arbitrator that Section 5.1 is indeed applicable to the instant grievance. As Arbitrator Nicolau concluded in *NN 87-1* at pages 8-9:

> "The first issue here is whether the projected training session can be said to fall within the phrase 'Company operations.' Unlike 20.4, where 'operations' Union representatives may inspect are 'operations covered by [the] Agreement,' the use of 'operations' in Article V is unmodified and unrestricted. It would thus refer to any Company

> activity. Such a meaning is consistent with the purposes of Section 5.1 and the pledges both parties made therein, while a narrower interpretation would be inconsistent with the breadth of those pledges."

Judge Cedarbaum affirmed this finding in Civ. 3870.

Moreover, the Preamble to the 1993-1997 NABET-ABC Master Agreement clearly defines "Company" as including entities, facilities, and operations which, in some instances are not encompassed by the terms and conditions of the Agreement. In paragraph two of the Preamble is reference to the intent of the parties regarding the Agreement, specifically noting that the Agreement includes "a procedure for prompt, equitable adjustment of grievances to the end that there shall be no work stoppages or other interferences with operations during the life of these Agreements."

Moreover, the record indicates that the Company has been hiring per diem employees, without objection by the Union, to work in Hawaii, Puerto Rico, etc. In those instances where the Union has objected and filed grievances, the arbitral awards cited do not require a different award interpretation.

For example, *NIO 80-2*, Umpire Nicolau considered whether the Company was obligated to negotiate with NABET over an ENG assignment made under Section A2.2(e)7.

In *NIO 81-1*, Umpire Nicolau held that the Company has an absolute right to hire freelance (non-staff) employees to work the Hawaiian Open without dealing with NABET. There was no duty to negotiate over sending non-staff employees to Hawaii.

Appendix A

Finally, in *AN 91-078*, I held that, with regard to the use of regular daily hires for pickups under the Master Agreement, the Company can directly deal with such daily hires to work and entire golf season.

Thus, it would appear that the case relied upon by NABET, Umpire Roberts decision in *NB 74-33*, is limited in its application to staff employees.

A look at past bargaining history with regard to the scope of the Union's jurisdiction in Section 7.1 further evidences the disingenuousness of the Union's position herein. In its 1977, 1981, and 1985 proposals regarding Section 7.1, the Union sought to obtain jurisdiction outside the continental United States, without any geographical restriction. It was unsuccessful on all counts. In 1989 proposals, the Union proposed that their jurisdiction be the entire United States. Again, their effort proved unsuccessful.

It can easily, therefore, be argued, as the Company has, that the Union is seeking through self-help or hoped-for ruling herein, to achieve in arbitration what it could not achieve in collective bargaining.

Finally, the Arbitrator would note that on at least two previous occasions the Union has filed unfair labor practice charges with the NLRB regarding claims for rights being denied with regard to daily hires who were engaged outside the continental United States. The first charge was dismissed by the Regional Director for District 10, noting that the daily hires in question were not part of the bargaining unit. The second charge, alleging the Company violated the NLRA by engaging in direct dealing and negotiations with per diems and freelancers

for assignments in Hawaii, Alaska, Puerto Rico and overseas. Following a written response by the Company detailing the long history of such dealings, the charge was withdrawn by NABET.

Accordingly, the live pickup from Hawaii of the Aloha Bowl, as well as the subsequent pickups of the Pro Bowl, Battle of the Gridiron, and Hawaiian Open, are, in my view, Company operations, and thus something the Union and its members cannot interfere with as long as the Agreement is in force.

The remaining question is whether, in all the circumstances, the proof presented by the Company is sufficient to warrant any or all of the relief permitted under Section 20.10. In that regard there can be no dispute that there is ample precedent for holding (1) that threats of interference fall within 5.1 and (2) for ordering an injunction based on the type of proof offered here.

In *NN 87-1*, Arbitrator Nicolau, after quoting from Arbitrator Roberts in *NN 69-90* and *NBC 69-1 and 2*, held that "the language of Section 5.1 does not purport to treat "other interference" with less seriousness than strikes or stoppages. Nicolau went on to hold that the Union's reported claim of a contract violation on the Company's part is no defense to the injunction request, quoting from *NN 69-96*, that "Nowhere in the agreement is there an exemption from no-strike [read 'non-interference'] mandate because of a real or fancied contract violation by the Company."

The proof presented by the Company is as follows. Beginning in early October, the Company began contacting a number of per diem and freelance employees for assignment to the Aloha Bowl. By the end of October, 16 such employees

had made verbal commitment to work the Aloha Bowl under the terms and conditions established by the Company.

By letter dated November 15, 1996 from John Krieger, NABET Network Coordinator, to all daily hires at ABC with regard to NABET's efforts to demand a fair contract for ABC daily hires who work at remote locations, Mr. Krieger advised as follows:

> "If NABET-CWA engages in boycotting, informational picketing, handbilling, or other lawful activity at such remote locations, the Union will require that you support your brothers and sisters to the fullest possible extent."

Subsequently, by letter dated December 6, 1996, from John Clark, NABET-CWA President, to Harry Floyd, Assistant to the President, IATSE, advising as follows:

> ". . . NABET-CWA will engage in various forms of lawful activities designed to achieve fair working conditions for the daily hires who do [overseas pickups]. Moreover, we will be advertising throughout such remote locations that ABC doesn't have a union contract with NABET-CWA for the employees hired to do the work. The Hula Bowl and Pro Bowl in Hawaii are possible targets for these actions.
>
> "It is entirely possible that ABC may contact or may have already contacted your organization to provide manpower for these remotes. Since we are firmly committed to organizing this work, we would

> appreciate your cooperation with our efforts by turning ABC down and insisting that the company negotiate with NABET-CWA, the Union chosen by the workers as their representative."

The Company then presented evidence which indicated that of the 16 per diems who had committed to the Aloha Bowl assignments, only four (4) remain committed. In that regard, Leonard Nathan, Production Executive, testified that he was the one responsible for coordinating the crews, including freelance employees, for the Aloha Bowl. In addition to the freelancers, Nathan testified that local Hawaiian employees would also be used.

The first indication of any problems began with a voice message from Kevin O'Harrow, one of the 16. He said he was no longer available because of negotiations between NABET and NBC. Nathan testified that no such negotiations were occurring.

On December 5, Nathan called Greg Lilly to see if he was available to work the Aloha Bowl. When Lilly agreed, Nathan advised him of alleged Union threats. Lilly said he would get back to him. When Lilly next called he told Nathan he had spoken with Gina (a NABET official) in Los Angeles, who said he would be subject to fines, but not expulsion. Lilly then declined the assignment.

Also on December 5, Alex Williams called Nathan regarding a Rose Bowl assignment, and said he was unaware of any threats. After talking with the Union, Williams told Nathan that Kevin Wilson, President of San Francisco Local 51, told him that there would be fines. Williams declined the assignment.

Nathan further testified that the Production Manager received two phone messages from previously assigned per diems, who both withdrew. One of them, Erick Leidal, was quoted as having said, "I can't go, the Union won't let me go."

On December 10, Nathan had a conversation with Lee Pfannerstill regarding his previous commitment. After talking with the Union, Pfannerstill left a voice mail, which was played at the hearing, in which he said Kevin Wilson told him he would be fined and it involved a "court thing" if he worked the Aloha Bowl.

Also on December 10, Nathan had a conversation with Fran Lopez. She told Nathan that she had spoken to Tony Capitano, President of Local 16, who told her that employees who worked the Aloha Bowl would be fined and possibly dismissed from the Union, but that since her commitment was prior to the Union's actions, she could go. Lopez then indicated that if there were pickets, she would be uncomfortable crossing the line.

John Morris, another per diem, left a voice mail, which was also played at the hearing, wherein he removed himself saying that the pending action with NABET presented a problem.

On December 16, Bruce Smith left a message, which was played at the hearing wherein he said he talked with the Union and he could not cross a picket line. He withdrew from the assignment saying he was being put in an awful position by the NABET.

Finally, Bob Apter, Senior Vice President of Finance and Administration for ABC Sports, testified that, based on the

above, he contracted with a third party in Hawaii to provide "complete crew back-up," which would consist of people who had never worked for ABC before. He indicated this raised concerns about the quality of the telecast of the Aloha Bowl.

The Company then made a proffer with regard to the other sports pickups in Hawaii scheduled for January and February 1997. With regard to the Pro Bowl, 15 individuals out of 30 who had given previous commitments, have canceled. As to the Hawaiian Open, the Company is just beginning to set up the crewing.

I find that above summarized evidence and proffer establish that a threat to interfere with Company operations was made, that a disavowal has not been forthcoming, and that said threat has already had the effect of interfering with Company operations, as previously described herein. I also find, on the basis of the proof presented, and the Union's decision not to appear, that the Company's request for an injunction is reasonable.

Before setting forth specifically the scope of the injunctive relief, I should note that in its request for relief, the Company asks for a wide-ranging injunction, as well as a request that the Union take other steps to disavow their proposed activities. (See Attachment 2.) In addition, I have been requested to retain jurisdiction, and to establish a further hearing date for purposes of taking evidence on the question of appropriate punitive and compensatory damages.

In considering that request, as well as noting that this matter has now and upon issuance of this Award will continue to be before the District Court, I believe that the injunctive relief

should primarily be addressed to the Aloha Bowl, and the types of interference, already identified, which the Union should be precluded from engaging in with regard to the other identified sports pickups from Hawaii in late January and February, 1997.

Therefore, the Undersigned, acting as the duly appointed Impartial Umpire for 20.10 grievances; and having heard the proofs and allegations of the Company after giving the Union full and fair opportunity to appear, renders the following.

AWARD

The International and its Locals, officers and agents may not picket or engage in other means of interference with Company operations related to the live broadcast of the Aloha Bowl in Hawaii on December 25, 1996.

Such "other means of interference with Company operations" includes, but is not limited to, inducing or seeking to induce per diems/freelancers to decline acceptance of any assignment for the Aloha Bowl through threats and/or fines, expulsions or other retaliation for doing such work, as well as inducing Hawaiian locals to decline such assignments, or interfering with the delivery or acceptance or transmission over the network of the signal from Hawaii.

The Arbitrator shall retain jurisdiction, and, depending on the status of the pending or any further Civil Action, will convene another hearing for the sole purpose of considering the Company's request for additional injunctive relief with regard to the future broadcasts of the Pro Bowl, Battle of the Gridiron, and the Hawaiian Open, and for possible punitive and/or compensatory damages.

Appendix A

s/ Herbert Fishgold
Herbert Fishgold
Impartial Umpire

Washington, D.C.
December 19, 1996

s/ Douglas Henne
DOUGLAS HENNE
NOTARY PUBLIC OF COLUMBIA
MY COMMISSION EXPIRES: 7-31-98

Appendix A

ATTACHMENT 1

ABC 96-01

Article 20-10 (Aloha Bowl)

In the Matter of

ABC, Inc.

and

NABET/CWA

Interim Order

By fax dated December 6, 1996, the Company filed with the undersigned in Article 20.10 grievance asserting that, in violation of Article V of the Master Agreement, officials and agents of the International Union have engaged in verbal threats and other unlawful actions against individuals engaged by the Company to assist in the broadcast of the Aloha Bowl in Hawaii on December 25, 1996, thereby constituting "interference with Company operations."

The Company asked for an immediate hearing, and at its conclusion, injunctive relief as well as compensatory and punitive damages.

That same afternoon, Ralph Phillips, counsel for NABET, called to advise that he would formally respond on behalf of NABET on Monday, December 9. By fax dated December 9, Mr. Phillips took the position that the Arbitrator lacked subject

matter jurisdiction, since the alleged actions by the Union in connection with the Company pickup in question are not covered by the Master Agreement; thus; there is no arbitrable matter.

By fax dated December 10, the Arbitrator proffered the date of December 12, 1996 as a proposed hearing date for purposes of first determining my jurisdiction, if any, and subject to finding said jurisdiction, to a hearing on the merits.

In a subsequent conference call between the parties and the Arbitrator on December 10, it was determined that a December 12 hearing was not possible, and it was further determined that another conference call would take place on December 11, at 1:30 p.m. EST to further discuss the processing of the pending 20.10.

By conference call on December 11 it was agreed that the parties would have until 4 p.m. PST to fax their submissions on the jurisdictional issue of subject matter arbitrability, and that, pending a ruling by the Arbitrator, the date of Wednesday, December 18, 1996, would be designated for a possible hearing in New York.

The Arbitrator received the faxed submissions during the early evening of December 16, and after careful review of all the arguments and materials in support thereof, conclude that I have the authority to rule on the instant subject matter arbitrability since what I am being asked to do is interpret Section 5.1 and its application, if any, to the broadcast of the Aloha Bowl from Hawaii on December 25, 1996. Only if I should make a ruling, based on the record presented to me at hearing, that Section 5.1 is applicable, would a hearing on the

merits of the Company's allegations concerning the Union's actions be held.

In reaching this conclusion, I note that Article 20.10 is not a general arbitration provision, but rather is an exception to the body of Article 20, and provides for a very specific and limited procedure, requiring that certain criteria must be met in order for a 20.10 procedure to be invoked by either party. Herein, those criteria have been met: Article V is one Article subject limited class of disputes; the alleged actions (the threatened disruption of the Aloha Bowl broadcast) are "not yet effectuated;" time does not permit the processing of grievance under other sections or Article XX, and the grievance has been discussed by a designated officer of the International Union and a member of the Labor Relations Department."

Moreover, in addition to alleging a threatened violation of Section 5.1, both parties have cited prior arbitration awards as bearing on the application of Section 5.1 and Article 20.10, and the interpretation of "Company operation" and rights of NABET-represented employees. In that regard, Article 20.10 also makes reference to prior arbitration awards. The Company relies on *NBC-NN-87-7* (Nicolau) and the Union relies on *NB 74-33* (Roberts).

In the Arbitrator's opinion, Article 20.10 provides for a broad jurisdictional grant when the very specific criteria involving a limited class of disputes are met. Moreover, Article 20.10 specifically names the undersigned as the Arbitrator designated to process and hear 20.10 grievances,

Accordingly, the Arbitrator, having determined that he has the jurisdiction to decide questions of subject matter

arbitrability, finds the matter arbitrable. A hearing to determine whether, in fact, under all the circumstances already referred to in the parties' submission, and any additional evidence and testimony to be presented, Article 5.1 is applicable to the Aloha Bowl broadcast, and, if so, whether the alleged actions of the Union, if proven, constitute a violation of Section 5.1, will begin on Wednesday, December 18, 1996, at 10 a.m. in New York. Based upon the apparent inability to reasonably arrange for a hotel site in New York, the Arbitrator is agreeable to conducting the hearing at the Company's offices at 77 West 66th Street, in the 15th Floor Conference Room, provided that adequate room, phone and fax and/or other services are made available to the Union.

Respectfully submitted, this 17th day of December, 1996.

s/ Herbert Fishgold
Article 20.10 Arbitrator

Appendix A

ATTACHMENT 2

Remedy: Direct the International Union, its Locals, and the Officers, employees and agents of each of them to:

1. Immediately cease all activity with the intent or effect of inducing personnel to decline to accept any assignment for the Aloha Bowl or other upcoming Hawaii telecasts, including but not limited to immediate cessation of any statements to anyone that persons who work these events will be fined, expelled or suffer any retaliation for doing such work.

2. Immediately cease stating that NABET will picket these Hawaii events and refrain from engaging in any picketing of such events, or any other activity at the event with the intent or effect of coercing or persuading persons who have agreed to work the event refuse to do so.

3. Within 24 hours from the issuance of this award, the International Union, by its President John Clark, shall immediately provide written assurances to all individual who the Company has contacted or hired for these Hawaii pickups that they are free to work any of these events that they choose; that they will not be fined, expelled or suffer any retaliation by the Union for doing so; that there will be no picket line or other Union presence at these events with the intent or effect of persuading them to refrain from working these pickups. The Company shall provide lists of the freelance personnel who it has contacted or hired to work these Hawaii events for the Union to follow in sending out this distribution.

4. The Impartial Umpire shall retain his jurisdiction over this matter for the purposes of enforcing this award, as

necessary. The parties shall agree upon a date for a subsequent hearing before the Impartial Umpire on the issue of damages. Failing agreement, the Impartial Umpire shall set a hearing date to determine this issue.

5. Prevent NABET or its officers and/or agents from interfering with any local hiring of individuals in Hawaii, and to not interfere with the delivery or acceptance of transmittals over the network's signal from Hawaii.